FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 7
A218/17

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

VINCENT MARTIN FRIEL

Pursuer and Reclaimer

against

DR IAIN BROWN

Defender and Respondent

Pursuer and Reclaimer: Sutherland QC, Waugh; Lefevres
Defender and Respondent: McGregor; BTO LLP

20 February 2020

Introduction

[1] This is a reclaiming motion by the pursuer against the Lord Ordinary's interlocutor of 22 March 2019 which dismissed his action for damages against the defender. The defender was the pursuer's General Medical Practitioner. The action is based upon his alleged negligent prescription of a drug. The pursuer avers that the drug caused him to lose

consciousness while driving. This resulted in a collision on a pedestrian crossing which left one person dead and another seriously injured.

[2] The interlocutor, which was pronounced after a debate on the Procedure Roll, states that the dismissal was on the basis that the action was "an abuse of process". The reasoning behind that was that the pursuer had been convicted of causing death and serious injury by dangerous driving under respectively sections 1 and 1A of the Road Traffic Act 1988. The jury's verdict involved a rejection of the pursuer's special defence of automatism; *viz.* that he had lost consciousness prior to the accident. The Lord Ordinary held that the action constituted a collateral attack on the pursuer's conviction. The pursuer unsuccessfully argued that section 10(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 entitled him to rebut what was only a presumption that he committed the offence.

Legislation

[3] Section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides:

> "10.— Convictions as evidence in civil proceedings.
> (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom … shall … be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; ….
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom … —
>
> (a) he shall be taken to have committed that offence unless the contrary is proved…".

There is an equivalent provision in England and Wales (Civil Evidence Act 1968 s 11).

The Pursuer's Averments

[4] In 2002, the pursuer was receiving treatment for mild hypertension (high blood pressure). From 2004, he was referred to a consultant cardiologist and prescribed a single drug, namely Losartan. His condition was well controlled until 2008, when he developed a pulmonary embolus. He was prescribed sundry additional drugs before, following a review by the cardiologist in August 2012, returning to the "mono therapy" of Losartan.

[5] On 14 November 2013, the pursuer attended the defender's practice, who was his longstanding GP, complaining of headaches during sexual intercourse and light headedness whilst exercising. He was having difficulty in remembering names (aged 42). He had been stressed at the consultation, because he had been late. His blood pressure was slightly elevated but, after a brief period of rest, it returned almost to normal. The defender prescribed a second anti-hypertensive drug, namely Tildiem. Tildiem is one of a group of medicines known as "calcium channel blockers". It has an effect on blood pressure, but in a different way from Losartan. It can increase the effect of certain other medications which are used to treat high blood pressure and can cause light-headedness. A number of common side effects, including headaches and dizziness, have been noticed. Combining the drugs is likely to have an additive affect in reducing blood pressure to a severe degree. Concurrent use can increase the risk of hypotension (low blood pressure).

[6] The pursuer had an anxious personality, particularly in relation to his health. He had been taking Viagra and Lipitor (an anti-cholesterol drug). The pursuer deferred taking the Tildiem until after he had completed a programme of physical exercise. He began taking it on 18 December 2013. It would not have had an immediate effect.

[7] On 18 January 2014, the pursuer had run for several kilometres on his home treadmill. He had finished running around 2.00pm. He went out in his car. At 4:40pm he

was stationary behind two other vehicles at a pedestrian crossing, which was controlled by traffic lights. When the lights were at green, the vehicle in front moved off. The pursuer avers that he then suffered a vasovagal attack, or syncope, and blacked out. This resulted from a rapid fall in blood pressure and heart rate, which was caused by the addition of the Tildiem to his existing medication. The pursuer's car, which had an automatic transmission, moved forwards at about 4 mph, through a red light and struck the pedestrians.

[8] On 17 February 2016, the pursuer was convicted of causing death and serious injury in contravention of sections 1 and 1A of the Road Traffic Act 1988. He had lodged a special defence of automatism. This read that, at the time of the accident, the pursuer:

> "… was in a state of unconsciousness at the time of the alleged offence as a result of a medical condition which manifested itself by a fall in blood pressure and a consequent profound faint reaction, namely a vasovagal attack, which … resulted in total alienation of reason amounting to total loss of control of actions."

The trial judge's report in the subsequent unsuccessful appeal stated that one of the issues at the trial had been whether the Crown had proved that the pursuer had been driving in the legal sense at the relevant time, in view of the special defence of automatism. The judge observed that the question of whether the appellant had suffered an attack of syncope (ie blacked out) was the main issue. He directed the jury that, before they could convict, they had to be satisfied beyond reasonable doubt that the Crown had proved that the pursuer had not suffered such an attack. The judge commented that the jury had clearly been satisfied that the pursuer had not blacked out. It is admitted by the pursuer that the plea of automatism was rejected by the jury.

[9] The pursuer's claim against the defender for £500,000 in damages includes the psychological effects of the accident and the stress of the trial and conviction. It includes the cost of his defence, which he required (for unspecified reasons) to fund himself. He was

sentenced to 3 years imprisonment on 16 March 2016 and was disqualified from driving for 5 years. As a result, he was unable to see his son. The pursuer had been a successful businessman and sole trader. He was a self-employed landlord and property developer. He had lost his business and his income.

The Lord Ordinary's decision

[10] The defender had argued that the action was an "abuse of process", standing the criminal conviction. The Lord Ordinary observed that, although there was no Scottish authority for the proposition that "a collateral attack in civil proceedings on a conviction is an abuse of process", there was in England and Wales, and Mauritius (*Hunter* v *Chief Constable* [1982] AC 529; and *Hurnam* v *Bholah* [2010] UKPC 12). *Wright* v *Paton Farrell* 2006 SC 404 had cast doubt on the procedural mechanism in Scotland for dismissing a claim on abuse of process grounds, but the law relating to the inherent power of the court was now further developed (*Tonner* v *Reiach & Hall* 2008 SC 1). It was well established that the court could dismiss an abusive action (*Moore* v *Scottish Daily Record and Sunday Mail Ltd* 2009 SC 178).

[11] The pursuer's action raised an issue which had been determined against him in criminal proceedings; that he had lost consciousness at the time of the accident. The pursuer's averments ran contrary to the basis for the conviction. The action involved a collateral challenge to it (*Smith* v *Linskills* [1996] 1 WLR 763, at 769). Scots law recognised the maxims *nemo debet bis vexari pro una et eadem causa* (no one should be tried twice in respect of the same matter) and interest *reipublicae ut sit finis litium* (the public interest in the finality of litigation) (*Arthur JS Hall & Co* v *Simons* [2002] 1 AC 615; *Wright* v *Paton Farrell* 2006 SC 404; and *Kamoka* v *Security Service* [2017] EWCA (Civ) 1665). Collateral challenges were an abuse

of process because of the public interest in preventing the re-litigation of issues which had already been tried. It could cause a loss of confidence in the administration of criminal justice, if the public perception was that there were means to challenge a conviction other than by appeal. The public policy objection was not limited to cases in which the sole purpose of the action was a collateral challenge (*Amin* v *Director General of the Security Service (MI5)* [2015] EWCA (Civ) 653; *Smith* v *Linskills* (*supra*)). It was competent to deal with the abuse of process by way of summary dismissal (*Tonner* v *Reiach & Hall* (*supra*); *Clarke* v *Fennoscandia Ltd (No 3)* 2005 SLT 511; *Lord Advocate* v *McNamara* 2009 SC 598), albeit that that was a power of last resort.

[12] In proposing reform in 1967, the Law Reform Committee (Fifteenth report) had expressed the view that *Hollington* v *F Hewthorn and Co* [1943] KB 587 had been wrongly decided (see *Goody* v *Odhams Press* [1967] 1 QB 333, and *Hunter* v *Chief Constable of the West Midlands Police* (*supra*)). The Committee had not envisaged reliance on a conviction, other than by someone who was pursuing the convicted person when seeking to establish civil liability. It had not considered the possibility of collateral attacks on convictions by persons who were initiating actions, other than in the context of defamation (cf the 1968 Act, s 12; Civil Evidence Act 1968, s 13). Section 10(2) of the 1968 Act did not assist the pursuer. Parliament had allowed for a rebuttal of the basis for a conviction where the convicted person, or someone else liable to make reparation for his acts or omissions who had not been a party to the criminal proceedings, could be liable to pay money. That was because that liability was additional to the penal consequences of the conviction. The civil courts could not, by virtue of section 10(2), be asked directly to find that a subsisting conviction was wrong (*Towers* v *Flaws* [2015] CSIH 97); *Hall-Craggs* v *Royal Highland and Agricultural Society of Scotland* 2016 SLT 311).

Submissions

Pursuer

[13] The pursuer maintained that the action was not a collateral attack on the conviction. There was no identity of issues. Such identity only arose when the conviction had a clear resemblance to the issues raised in the civil action (*Cronie* v *Messenger and Kelly* (unreported, C.J. Macaulay QC, 25 June 2004). There had been no issue at the trial about the negligent prescription of medicine. If the argument that the pursuer had lost consciousness had been accepted by the jury, this would have extinguished any criminal responsibility. There was no question of challenging the conviction. It stood until such time as the pursuer was successful in his application to the Scottish Criminal Cases Review Commission and any subsequent reference to the High Court. If he was successful in this action, the evidential basis of his conviction would remain undisturbed. Public confidence in the courts would not be undermined (*Towers* v *Flaws* (*supra*)). There was limited authority on what constituted an abuse of process in Scotland. The thrust of the references to it indicated a requirement for intentional action which was carried out in bad faith, fraudulently or for an illegitimate purpose (*Levison* v *Jewish Chronicle* 1924 SLT 755; *Shetland Sea Farms* v *Assuranceforeningen Skuld* 2004 SLT 30; *Clarke* v *Fennoscandia (No 3)* (*supra*) and 2008 SC (HL) 122).

[14] If there was an identity of issues, section 10 of the 1968 Act was engaged. The action could not be an abuse of process, when section 10(2) permitted the pursuer to rebut the presumption arising from the conviction (*Towers* v *Flaws* (*supra*); *Hall-Craggs* v *Royal Highland and Agricultural Society of Scotland* (*supra* at para [19]); Walker and Walker, *Evidence* (4th ed) at para 11.5.3). The reason for the rule in *Hollington* v *F Hewthorn and Co* (*supra*), that

evidence of a criminal conviction was inadmissible in a civil trial, was that findings of fact by one decision maker should not bind a subsequent decision maker who may be considering different evidence. Decisions of the court were not infallible. That is why the Law Reform Committee had not recommended that a conviction should be conclusive proof. The recommendation was that a conviction should be admissible in subsequent civil proceeding, with the effect that the onus of proof be reversed.

[15] It was accepted that the pursuer was not raising the action with the sole or dominant purpose of attacking his conviction. He was genuinely seeking to recover damages. The issue of law between the parties was whether the conviction was relevant to the civil action and whether the statute permitted the pursuer to seek to rebut the presumption created by the conviction.

Defender

Abuse of Process

[16] The Court had an inherent power to dismiss an action where there was an abuse of process. The action was a collateral challenge to the pursuer's conviction; the jury having rejected the special defence of automatism arising from a loss of consciousness. The pursuer sought to establish that he had been wrongly convicted, in that he had suffered a vasovagal attack, or syncope, as a result of the prescription of Tildiem. The action ran contrary to the public interest in preventing re-litigation of the same issues (*Towers* v *Flaws* (*supra*); *Tonner* v *Reiach & Hall* (*supra*); *Wright* v *Farrell Paton* (*supra*); *Clarke* v *Fennoscandia (No 3)* (*supra*); *Hunter* v *Chief Constable of the West Midlands Police* (*supra).* Section 10 of the 1968 Act permitted the rebuttal of a presumption raised by a criminal conviction. It was not a statutory vehicle for mounting a collateral challenge to a subsisting criminal conviction. It

could not have been Parliament's intention to permit a pursuer to rely on a conviction, under section 10(1), with a view to rebutting it under section 10(2).

Decision

[17] The action is not an abuse of process. It should not have been dismissed on that ground. The idea that an action could be summarily dismissed, on the basis of an abuse of process in advance of a decision on the Procedure Roll or before a proof or jury trial, arose from the Extra Division's decision in *Tonner* v *Reiach and Hall* 2008 SC 1. The focus in *Tonner* was delay, as it was also in *Hepburn* v *Royal Alexandria Hospital* 2011 SC 20 and is now in RCS 21A. It is an accepted part of Court of Session practice that, for example, where a fair trial is not possible, the court, as a last resort, can use this draconian power (*Grubb* v *Finlay* 2018 SLT 463, LP (Carloway), delivering the opinion of the court, at para [34]).

[18] This case does not involve summary dismissal. The action progressed in the normal fashion to a Procedure Roll on the defender's first plea-in-law to the relevancy of the pursuer's averments (the second plea on the consequences of a person's illegal conduct having ultimately been reserved until after proof). The issue is one of relevancy, *viz*: can the pursuer succeed after proof in a case against the defender, for damages in respect of the negligent prescription of a drug, when a jury in the High Court has found it proved beyond reasonable doubt that the damages averred were not caused by the effects of the drug, but by the pursuer's own (conscious) dangerous driving?

[19] In the admittedly different context of *RG* v *Glasgow City Council* [2019] Fam LR 119, the court followed *Grahame* v *Secretary of State for Scotland* 1951 SC 368 (LP (Cooper) at 387) and explained (at para [27]) that the principle behind the plea of *res judicata* was:

> "based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis".

As in that case, the parties in this case are not the same and that plea may not be available as such. Nevertheless, the public policy, equity and common sense considerations are the same when a jury in a criminal trial has found a particular fact proved beyond reasonable doubt and the convicted person seeks to challenge that fact in a civil process which involves a lesser standard of proof.

[20] The public policy considerations were explored, again in a different, but this time related, context in *Wright* v *Paton Farrell* 2006 SC 404 in which the Lord President (Hamilton) said (at para [17]) that:

> "There is ... a strong public interest in the soundness of subsisting criminal convictions not being capable of challenge, directly or indirectly, otherwise than by the processes of appeal or review set down by Parliament or recognised by well-established criminal procedure."

[21] This policy had earlier been considered by the House of Lords in *Hunter* v *Chief Constable* [1982] AC 529. *Hunter* involved the "Birmingham Six". The abuse of process principle was used to prevent the use of a civil action to initiate a collateral attack on a decision of a criminal court as a matter of public policy. The policy arose again in *Arthur JS Hall* v *Simons* [2002] 1 AC 615, which concerned, as in *Wright* v *Paton Farrell* (*supra*), the immunity of advocates. It was made clear that it was contrary to public policy to permit a collateral challenge in civil proceedings to a criminal conviction. If a convicted person wished to challenge a conviction he must first do so by way of appeal (see Lord Steyn at 679; Lord Browne-Wilkinson at 684-5; Lord Hoffmann at 706; and Lord Hutton at 730).

[22] The public policy considerations are clear. There ought not to be two conflicting court decisions: a High Court jury determination that finds it proved beyond reasonable

doubt that the drug, which the defender had prescribed, did not cause the pursuer to lose consciousness; and a Court of Session finding in an action raised by the convicted person that, on the balance of probability, it did. It is different if there has, for example, been an acquittal and a pursuer seeks to prove on a balance of probability that the defender has committed the offence. A finding to that effect would not be inconsistent with the conviction.

[23] It is also different when the convicted person is the defender. In that event, for the reasons explored by Lord Diplock in *Hunter* v *Chief Constable* (*supra* at 544) relative to the equivalent English statute, section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 will apply. That section does not permit a convicted pursuer to make reference to his conviction, and then to rely upon its existence for his damages claim, with a view to using section 10(2) to rebut the presumption that the conviction was sound. Such a course would conflict with the public policy considerations already explored.

[24] For these reasons, although the reclaiming motion is in substance refused, the court will recall the interlocutor of the Lord Ordinary dated 22 March 2019, sustain the defender's first plea-in-law and dismiss the action.